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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

VICTOR FERNANDEZ et al., Plaintiffs and Respondents, v. VILLAS PAPILLON, LLC, Defendant and Appellant.	A151765 (Alameda County Super. Ct. No. RG13683606)

Plaintiffs Victor Fernandez and Seifeddin Aburas filed a putative class action complaint on behalf of current and former tenants against Villas Papillon, LLC (Villas Papillon) alleging unlawful rent increases. After the class action complaint was filed, Villas Papillon entered into confidential settlement and release agreements (release agreements) with the majority of the putative class members. Plaintiffs then filed a class certification motion, seeking to represent all tenants who paid rent increases, including those who had settled their claims. The court granted the motion.

Following a bifurcated bench trial, the court concluded the release agreements were void and awarded the class damages. Villas Papillon subsequently appealed, alleging the class was improperly certified, the trial court erred in finding the release agreements unenforceable and void, and disputing the damage award. We conclude the trial court erred in certifying the class. Accordingly, we vacate the judgment, including the order voiding the release agreements, and class certification order, and remand for further proceedings consistent with this opinion.

I. BACKGROUND[1]

Villas Papillon is the owner of a residential apartment complex located in Fremont, California. In 1997, the City of Fremont enacted a "Residential Rent Increase Dispute Resolution Ordinance" (ordinance), which requires landlords to comply with certain notice requirements when imposing rent increases. Since enactment of the ordinance, Villas Papillon has increased rents by issuing notices of change of terms to its tenants (rent increase notices). The parties do not appear to dispute the rent increase notices omitted certain language required by the ordinance.

In 2013, plaintiffs filed a class action complaint alleging Villas Papillon collected unlawful rent increases from its tenants. After the complaint was filed, Villas Papillon presented release agreements to its tenants. The release agreements provided a rent reduction and one-time rent concession "[i]n full and final settlement of any and all claims by Tenant against Landlord relating to the Notices of Change of Terms and any issues associated with the Notice of Change of Terms." The release agreements also contained a broad release, which released Villas Papillon "from any and all actions, causes of actions, claims, demands, rights, injuries, debts, obligations, liabilities, contracts, duties, damages, costs, attorneys' fees, expenses or losses of every kind, nature, character, or description whatsoever, that accrued at any time prior to execution of this Agreement . . . , whether known or unknown, anticipated or unanticipated, . . . including, without limitation, any and all claims related to or arising from the Notices of Change of Terms, including without limitation, any claims under Tenant's lease and other claims for (1) rent abatement, and (2) reimbursement of rental charges . . . ." Additionally, the release agreements contained a Civil Code section 1542 waiver of unknown claims. Of approximately 61 households, 47 executed release agreements. Plaintiffs, however, did not execute release agreements.

Plaintiffs subsequently filed an amended class action complaint. In addition to the allegations contained in the original complaint, the amended complaint asserted Villas

[1] We recite only those background facts relevant to our resolution of this appeal.

Papillon attempted to enforce the illegal rent increases by offering to return portions of those illegal rent increases via the release agreements, and that Villas Papillon separately violated the ordinance by doing so.

In 2014, plaintiffs filed their motion for class certification. Villas Papillon opposed the motion, arguing in part the proposed class is not " 'sufficiently numerous,' " and plaintiffs could not establish a community of interest. Specifically, Villas Papillon argued tenants who signed a release agreement would have distinct factual and legal issues—namely, the enforceability of those release agreements—from plaintiffs who did not sign such agreements.

The trial court continued the hearing for class certification in order to solicit additional briefing as to whether the validity of the release agreements raised common legal and factual issues. As part of this order, the trial court concluded, "Plaintiffs' claims are sufficiently similar to other members of the proposed class," and noted Villas Papillon did not demonstrate that plaintiffs had conflicts with, or could not adequately represent the interests of, other class members. The court further noted: "The fact that no members of the putative class have contested the validity of the [release agreements] is not relevant. . . . Plaintiffs have an adequate incentive to invalidate the [release agreements] and to conduct the necessary discovery to litigate that issue. Nor has Defendant demonstrated that this 'split' will create individualized issues, only that some putative class members might have more bases to challenge the [release agreements] than others."

Following supplemental briefing, the trial court subsequently granted in part the motion for class certification. It restated its prior holding, including its conclusion that plaintiffs' claims were typical of the class. The court found the validity of the release agreements could be tried on a class basis, apart from plaintiffs' theory that the release agreements were unconscionable.

The parties submitted a stipulation to bifurcate trial, which was granted by the court. Pursuant to that stipulation, the enforceability of the release agreements was tried in the first phase. Following a bench trial, the court held the release agreements

constituted a rent increase as defined in the ordinance, and the release agreements did not have a lawful object and violated public policy. Phase II subsequently awarded damages to the class members. The court entered judgment in favor of plaintiffs and the class. Villas Papillon timely appealed.

II. DISCUSSION

Villas Papillon asserts the trial court erroneously certified the class because plaintiffs cannot demonstrate their claims or defenses are typical of the class.[2] We agree.

A. *Motion for Class Certification*

1. Legal Standard

The rules applicable to class action certification are well established: "Class actions are authorized under Code of Civil Procedure section 382 whenever 'the question [in a case] is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .' Under California law, a party seeking certification of a class must demonstrate three things: '[1] the existence of an ascertainable and sufficiently numerous class, [2] a well-defined community of interest, and [3] substantial benefits from certification that render proceeding as a class superior to the alternatives.' (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).) 'In turn, the "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." ' (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089 (*Fireside*).)" (*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213, 1221 (*Hendershot*).)

[2] Villas Papillon also challenges (1) class certification on the basis that the release agreements do not present common questions of law or fact and that plaintiffs lack standing; (2) the court's ultimate determination that the release agreements are unenforceable, void, and against public policy; and (3) the damages award. However, we need not reach these issues because we conclude plaintiffs failed to meet the typicality requirement for class certification.

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions.' " (*Brinker, supra,* 53 Cal.4th at p. 1022; accord *Calderone v. Scott* (11th Cir. 2016) 838 F.3d 1101, 1103 [" 'court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in ruling on class certification, makes clearly erroneous factfindings, or applies the law in an unreasonable or incorrect manner' "].) While the decision to certify a class is reviewed for an abuse of discretion, we review de novo any issues of law involved in the class certification. (*Marler v. E.M. Johansing, LLC* (2011) 199 Cal.App.4th 1450, 1459.)

2. Analysis

On appeal, Villas Papillon contends plaintiffs' claims are not typical of those putative class members who executed release agreements because plaintiffs did not execute such an agreement.[3] In response, plaintiffs contend the release agreements do not raise a unique defense against a class representative and do not evidence any antagonism or conflict between class members. Plaintiffs further argue even if releases

[3] Plaintiffs contend Villas Papillon has waived this argument by "barely rais[ing]" it below without any citation to legal authority. We disagree. Villas Papillon's opposition to class certification asserted, albeit briefly, the release agreements created dissimilarities between plaintiffs' claims and those of other tenants, which made plaintiffs "ill-suited to serve as the class representatives . . . ." Moreover, even if Villas Papillon were asserting a new theory, plaintiffs do not dispute the fact that certain class members signed release agreements whereas plaintiffs have not. "A new theory pertaining only to questions of law on undisputed facts can be raised for the first time on appeal." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 8:237, p. 8-174, italics omitted.)

may sometimes defeat typicality, in this instance the release agreements relate to the same core issue—Villas Papillon's violation of the ordinance.

The purpose of the typicality requirement " ' "is to assure that the interest of the named representative aligns with the interests of the class. [Citation.] . . . The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' " ' " (*Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375.) "It is only when a defense unique to the class representative will be a major focus of the litigation [citation], or when the class representative's ' "interests are antagonistic to or in conflict with the objectives of those [he or she] purports to represent" ' [citation] that denial of class certification is appropriate." (*Medrazo v. Honda of North Hollywood* (2008) 166 Cal.App.4th 89, 99.) When determining whether a proposed representative's claims and defenses are typical of the proposed class, a trial court may consider whether the representative and class members have signed settlement agreements. (See *Hendershot, supra*, 228 Cal.App.4th at p. 1223; see also *Fireside*, *supra*, 40 Cal.4th at p. 1090 [trial court may consider whether class "representative is subject to unique defenses"].)

We are unaware of any published California authority discussing whether a class representative who has not signed a release agreement may represent a class that includes individuals who have signed release agreements. Nor has either party cited such authority. However, a number of federal courts have discussed this issue and reached varying conclusions.[4]

In *Melong v. Micronesian Claims Com'n* (D.C. Cir. 1980) 643 F.2d 10, 15, a federal appellate court affirmed denial of class certification where some class members had signed releases but the proposed class representatives had not. It noted: "This issue

[4] California courts may look to federal law for guidance on class action procedure in the absence of California authority. (*In re BCBG Overtime Cases* (2008) 163 Cal.App.4th 1293, 1298.)

is not a novel one; it has been addressed often by courts in a variety of cases involving proposed class actions. In each instance, the court considering the question has concluded that proposed class members who have executed releases cannot be represented by individuals who have not executed a release." (*Id.* at p. 13.) The court explained: "The execution of a release does not conclusively bar prosecution of the underlying claim. The release itself may be found to be defective and therefore void. . . . [H]owever, . . . the existence of such releases adds new and significant issues to actions brought on the underlying claims. When the purported class representative has not executed a release and need not establish that the release is defective in his individual case, serious questions are raised concerning the typicality of the class representative's claims and the adequacy of his representation of other class members." (*Id.* at p. 15.) The court thus concluded "those claimants who executed releases may not be included within the proposed classes. If any arguments exist on their behalf, they must be presented by proper plaintiffs with the proper factual development." (*Id.* at p. 16.)

Numerous other federal courts have taken a similar approach. (See, e.g., *Langbecker v. Electronic Data Systems Corp*. (5th Cir. 2007) 476 F.3d 299, 313, fn. 26 ["Even if, as the dissent suggests, the effect of the releases may be considered on a classwide basis, the named Plaintiffs may not be adequate representatives of those class members who did sign them."]; *Stafford v. Brink's, Inc*. (C.D.Cal. Dec. 1, 2015, No. CV-14-01352-MWF (PLAx)) 2015 WL 12699458, at p. *14 ["Plaintiff is not an adequate representative of employees who have signed the settlement agreement and not yet revoked."]; *Carlstrom v. DecisionOne Corp*. (D.Mont. 2003) 217 F.R.D. 514, 516 ["Here, some 98 percent of the proposed class members signed a release in exchange for separation pay. Carlstrom did not. Carlstrom's position is plainly not comparable to the vast majority of proposed class members who signed releases and received payment. Typicality is missing."]; *Spann v. AOL Time Warner, Inc*. (S.D.N.Y. 2003) 219 F.R.D. 307, 320–321 ["In sum, Plaintiffs have not shown that they are adequate representatives of a Class including individuals subject to a Release defense."]; *Stewart v. Avon Products, Inc.* (E.D.Pa. Nov. 15, 1999, No. CIV. A. 98-4135) 1999 WL 1038338, at p. *4

[finding plaintiff is inadequate class representative where named plaintiff did not sign release and many members of class had]; *Javine v. San Luis Ambulance Service, Inc.* (C.D.Cal. Jan. 13, 2015, No. CV 13-07480 BRO (SSx)) 2015 WL 12672090, at p. *11 ["Plaintiff's claims are not typical of the claims of the putative classes because she has not signed a liability release agreement. In order to prevail on their claims, the majority of the putative class members who *have* signed a release agreement would have to prove either that the agreement is invalid or that it does not cover the claims at issue here, both of which are issues that Plaintiff lacks standing to raise."]; *Bublitz v. E.I. du Pont de Nemours & Co.* (S.D.Iowa 2001) 202 F.R.D. 251, 257 [holding that named plaintiffs could not satisfy typicality requirement because, unlike the putative class members, they did not sign a liability release agreement].)

Conversely, other federal courts have concluded the existence of release agreements does not bar class certification. In *Nitsch v. Dreamworks Animation SKG Inc.* (N.D.Cal. 2016) 315 F.R.D. 270, 284 (*Nitsch*), for example, the defendants briefly argued the plaintiffs' claims were not typical of the class because "some class members have arbitration or release agreements with some Defendants, and the named Plaintiffs were not party to the same agreements." The court rejected this argument: " '[D]efenses that may bar recovery for some members of the putative class, but that are not applicable to the class representative do not render a class representative atypical under Rule 23 [of the Federal Rules of Civil Procedure (28 U.S.C.)].' [Citations.] [¶] By contrast, affirmative defenses may pose a bar to typicality 'where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.' [Citation.] In such a case, 'class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.' [Citation.] That concern is absent where, as Defendants argue in the instant case, there may be defenses unique to some class members other than the class representatives. Notably, Defendants do not contend that typicality is defeated here based on any unique defenses faced by the named Plaintiffs that 'threaten to become the focus of the litigation.' " (*Ibid.*) The court concluded, "In the instant case, all class

members were injured by the same alleged antitrust conspiracy and incurred the same alleged injury—suppressed compensation caused by Defendants' single antitrust conspiracy. This is all that is required to show typicality." (*Ibid.*; see also *Finnan v. L.F. Rothschild & Co., Inc.* (S.D.N.Y. 1989) 726 F.Supp. 460, 465 (*Finnan*) ["Defendant submits that within the potential class, some employees had signed liability releases, others had signed arbitration agreements, and still others had voluntarily resigned. Defendant argues that its defenses are different as to each of these groups of employees. These issues and defenses are subordinate to the far larger common defense which Rothschild asserts against the Complaint."]; *Korn v. Franchard Corporation* (2d Cir. 1972) 456 F.2d 1206, 1212 ["[Plaintiff's] demands and her position are not atypical of the unreleased investors', or until the releases are sustained of the released investors' as well."].)

The weight of authority indicates named plaintiffs who have not signed release agreements are inappropriate representatives for individuals who have signed such agreements. Those cases holding otherwise either ignore or minimize the serious conflicts between the class representative and those individuals who signed releases. (See, e.g., *Nitsch, supra,* 315 F.R.D. at p. 285 [noting "the parties have not identified any conflicts of interests the Plaintiffs have with class members"]; *Finnan*, *supra*, 726 F.Supp. 460 [no discussion of potential conflicts]; accord *Conde v. Open Door Marketing, LLC* (N.D.Cal. 2017) 223 F.Supp.3d 949, 960 [rejecting reasoning in *Nitsch* because court "did not appear to consider whether a plaintiff who is not bound by an arbitration agreement is able to challenge the enforceability of that arbitration agreement"].)

As relevant here, plaintiffs are unable to show "[a]n absence of material conflicts of interest" with other class members based on their intent to attack and invalidate the release agreements. (*Rodriguez v. West Publishing Corp.* (9th Cir. 2009) 563 F.3d 948, 959.) As explained by the District Court for the Central District of California in *Stafford v. Brink's, Inc.*, *supra,* 2015 WL 12699458: "Plaintiff has made clear her intent to attack the validity of the settlement agreements on behalf of the putative members. The Court,

however, is concerned with the fact that Plaintiff's plans to undo the effect of the settlement agreement is at odds with the apparent intent of individuals who chose to accept the settlement offer and also declined to revoke the settlement agreement. These individuals appear committed to the settlement and, in holding steadfast to the settlement, may have assessed various tradeoffs, for example, between the sureness of a smaller upfront payment with the uncertainty of a greater upside at the end of litigation. Plaintiff is not in a position to disturb that choice. Furthermore, a conflict of interest arises in the sense that Plaintiff's motivation to enlarge the class for leverage would jeopardize these individuals' preference to settle their claims rather than participate in the class action." (*Id.* at p. *14.) The court thus concluded the plaintiff was not an adequate representative for the proposed class. (*Ibid.*)

A similar concern was raised in *Stewart v. Avon Products, Inc.*, *supra*, 1999 WL 1038338. There, the plaintiff argued she could be an adequate representative because "all proposed Class members ha[d] been similarly hurt by" the defendant's conduct. (*Id.* at p. *5.) The court rejected this argument and explained: "While the Court would hesitate to say Plaintiff's interests are antagonistic to the releasing Class members on this point, there is certainly an added complexity to having Plaintiff serve as Class representative. . . . [Plaintiff's] interests may significantly diverge from the other Class members if the settlements that Avon has previously entered with approximately 90% of the proposed Class are invalidated due to this litigation. The signing Class members received a lump sum payment in exchange for their release. If joined in Plaintiff's proposed Class, they may be forced to return the payment and be subject to counterclaim by Avon for breach of the release agreement. [Citation.] Second, the releasee Class members may end up with less money if the release is voided and the Class loses. Third, even if the Class wins, they may still receive less in damages than they did from the lump sum payment. All of these potential conflicts of interest could lead to a schism between Plaintiff and the various putative Class members regarding the appropriate strategy and remedy to pursue. It would be inappropriate to name as Class representative a plaintiff who, when faced with the same choice as her proposed Class members, chose a different course of action

than 90% of them. Therefore, the Court finds that the Plaintiff would not be an adequate Class representative."[5] (*Stewart*, at p. *5.)

As in *Stewart*, plaintiffs opted for a different course of action than most of the other tenants. This choice created the potential for conflicting interests between the plaintiffs and those tenants who executed release agreements, and the cases cited by plaintiffs do not necessitate a different conclusion. Undoubtedly, those cases approved class certification despite some class members executing release or arbitration agreements. But those cases did not address whether certification was appropriate when the proposed class representative had not signed such an agreement. (See, e.g., *Bittinger v. Tecumseh Products Company* (6th Cir. 1997) 123 F.3d 877, 884 [approximately two-thirds of the class, *including* proposed class representative, had signed release agreement]; *Finnan, supra*, 726 F.Supp. at p. 465 [no discussion of whether plaintiff signed release or arbitration agreements]; *Herrera v. LCS Fin. Servs. Corp.* (N.D.Cal. 2011) 274 F.R.D. 666, 681 [no discussion of whether proposed class representative signed release or arbitration agreement]; *Coleman v. GM Acceptance Corp*. (M.D.Tenn. 2004) 220 F.R.D. 64, 87 [reserving its analysis of class representatives' standing for pending summary judgment motion].)

Accordingly, plaintiffs fail to demonstrate their claims are typical of the class and thus have not established such claims are appropriate for class treatment. On remand, the trial court should consider how plaintiffs' lack of typicality impacts the class certification analysis, particularly the question of numerosity. We further note at oral argument

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[5] Other cases have expressed concern regarding the class representative's motivation to adequately challenge release agreements. (See, e.g., *Greeley v. KLM Royal Dutch Airlines* (S.D.N.Y. 1980) 85 F.R.D. 697, 701 ["Having refused to settle, plaintiff has no personal reason to be concerned with the means by which [defendant] induced settlements from others and therefore has no real interest in proving those settlements were wrongfully obtained. Thus his interest is not coextensive with the interests of the class members who settled, and his claim is not typical of those of the class."].) However, this concern appears less relevant considering plaintiffs' expressed intent to vigorously contest the release agreements (and their success in doing so).

plaintiffs' counsel represented that only three of the fourteen tenants who did not sign release agreements still reside at the premises. While " '[n]o set number is required as a matter of law for the maintenance of a class action,' " the court should consider the size of the class as well as " 'the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members.' " (*Hendershot, supra,* 228 Cal.App.4th at p. 1222.)

B. *Leave to Amend*

Plaintiffs request an order directing the trial court to grant leave to amend to add new class representatives. In response, Villas Papillon argues plaintiffs should not be allowed to amend because plaintiffs are misusing discovery to locate a new class representative, there is no evidence a releasor would want to serve in such a capacity, and the statute of limitations has run on such claims.

We decline to resolve this dispute. " 'Leave to amend a complaint is . . . entrusted to the sound discretion of the trial court. ". . . *More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court*." ' " (*Branick v. Downey Savings & Loan Assn*. (2006) 39 Cal.4th 235, 242, italics added by *Branick*.) Accordingly, the trial court should determine in the first instance whether the circumstances of this case warrant granting plaintiffs leave to amend.[6]

III. DISPOSITION

The judgment of the trial court, including the order voiding the release agreements, and the order granting class certification are vacated.[7] The matter is remanded for the trial court to reconsider plaintiffs' request for leave to amend and their

[6] Plaintiffs' counsel also suggested—for the first time at oral argument—remanding this matter to allow the trial court to establish a subclass. We note this issue was not raised in plaintiffs' brief and thus, even if establishing subclasses was appropriate, it has been waived. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [issues not briefed are deemed waived].)

[7] In so holding, we express no opinion as to the validity of the release agreements.

motion for class certification consistent with this opinion. Villas Papillon may recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Margulies, J.

We concur:

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Humes, P. J.

_____
Sanchez, J.

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